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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ESTATE OF DAVID BURKHART,)	No. C 07-5467 PJH
)	
Plaintiff,)	[PROPOSED] ORDER GRANTING
)	DEFENDANT'S MOTION TO DISMISS
v.)	
)	Date: August 6, 2008
UNITED STATES DEPARTMENT OF)	Time: 9:00 a.m.
VETERANS AFFAIRS,)	Place: Courtroom 3, 17th Fl.
)	
Defendant.)	

This action having come regularly on for hearing before the Court on the motion of defendant to dismiss pursuant to F.R.C.P. 12(b)(1), 12(b)(6) and 12(b)(7), and the respective parties having been afforded an opportunity to be heard, the Court having considered the respective pleadings and the arguments thereon, and the entire matter having been duly submitted after the Court was fully advised thereon,

IT IS HEREBY ORDERED that the defendant's motion to dismiss is GRANTED based on the following reasons:

1. The Court lacks subject matter jurisdiction over plaintiff David T. Burkhardt's claims because he did not exhaust his administrative remedies. Moreover, Mr. Burkhardt's claim for loss of parental consortium fails to state a cause of action.

1 2. The Court lacks subject matter jurisdiction over plaintiff Sally Burkhart's loss of
2 consortium claim because she did not exhaust her administrative remedies related to that claim.

3 3. Decedent David Burkhart's heirs are necessary, indispensable parties who must be joined
4 to Ms. Burkhart's wrongful death action.

5 4. The Court lacks subject matter jurisdiction over plaintiff Estate of David Burkhart's
6 survivor claims because no administrative claim related to those claims has been filed.
7 Moreover, Ms. Burkhart has failed to properly allege that she has standing to assert survivor
8 claims on behalf of the Estate of David Burkhart.

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10 Dated: _____

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12 PHYLLIS J. HAMILTON
13 UNITED STATES DISTRICT COURT JUDGE
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